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RANGANATHAN BOOK SYMPOSIUM SYMPOSIUM

Ranganathan Book Symposium: Part 2

Jasper Finke: Views of a Skeptical Formalist

JASPER FINKE — 1 April, 2016

Let me start with a confession: I am a formalist, at least to a certain extent, and a pragmatist, at least when it comes to treaty conflicts in international law – which is why Surabhi's book „Strategically Created Treaty Conflicts and the Politics of International Law" was not an easy read for me. This assessment, however, reveals more about myself and how I (would) approach the topic than it does about Surabhi's analysis, which I find intellectually provocative and very thoughtful. It is a tremendously important book that will not only change how we analyze and conceptualize treaty conflicts from now on, but that also provides an important

contribution to the fundamental debate on what international law is and how it works.

Readers looking for practical answers to the question of how to solve strategically created treaty conflicts will be disappointed, given that the book does not offer ready-made concepts – and that for very good and simple reason: such easy answers do not exist. Instead of taking the constructivist path (in other words, conceptualizing the underlying legal problem and proposing potential solutions to different categories of strategically created treaty conflicts, as I would have done it), the book focuses on what the phenomenon of strategically created treaty conflicts can tell us about international law in relation to international politics, and thus in relation to power. It is this broader objective pursued in her book that I will address first.

The main question that drives the book's analysis – does (international) law constrain politics, especially those of powerful actors, or is it contingent on (state) power and interest – has haunted lawyers, and not just international ones, for decades, even centuries. The formalist approach to law has always been influential in these debates, given that it offers an almost irresistible promise: that law is impartial, impersonal and consistent in its application, that it provides continuity and allows individuals to align their behavior with what the law requires. It seems to me that this take on law is particularly powerful in times in which law, in relation to political and economic power, has relatively little importance. In such circumstances, law's promise of a better and just world becomes increasingly appealing. Adding to that, a formalist concept also provides the tools for achieving this just and better world by juridifying all personal, political and economic interactions. In other

words, a formalist approach to law is also an idealistic one. But since idealism has difficulty prevailing in the 'real world,' law, in practice, has to fall short of the formalist approach's promises. In consequence, those who believed in the promises of law become disillusioned, while those who never did seized their chance to advance their explanations on how law works and its relationship to power and politics, which they usually describe as being more realistic.

This (admittedly simplified) account of the great tidal waves of how we conceptualize (international) law and its relationship to politics and power is, I think, important so as to locate Surabhi's analysis within the larger context of how international law has developed since the 1990s, and when and where it has since then fallen short of its promises. The preceding Cold War was an ideal period during which the formalist approach to international law could develop its promising potential. For its adherents, it offered a convincing alternative to the prevailing realist or neo-realist schools of international relations. When the Cold War ended, it seemed only logical that international law would now finally unfold its full potential: to bring about world peace through law. That promise, however, did not materialize. Even though international law increasingly gained importance, at least as a means of communication, it was also increasingly used to achieve specific political ends. This disappointment is, I think, reflected in Surabhi's book, seeing as she positions herself between Jack Goldsmith and Eric Posner's neo-realist approach to law, which they try to substantiate by borrowing some very basis concepts from game theory, on the one hand, and David Kennedy's intellectual reckoning with "mainstream legal scholars" and his disillusioned account of international law as "lawfare", and thus as an "allsorts discourse", on the other hand.

While I understand the disillusion with international law, one that I have felt as well, I found Surabhi's categorization of the existing literature – formalist, functionalist, and constructivist mainstream versus neo-realists and those committed to the idea of law as discourse – could appear too schematic. It is my impression that most formalists are aware of the limits inherent to their approach. The same holds true for most constructivists, given that any explanations or theories about the nature of international law and its workings cannot be separated from the specific historical contexts in which they were developed, in other words, they are always contingent on time and circumstances. If that is so, then all these approaches are, to a certain extent, valid – which in turn raises what could perhaps be a question for future debate, namely what each approach, whether formalist, functionalist, constructivist, neo-realists or "discoursivist" (for lack of a better term) can contribute to the problem of strategically created treaty conflicts. Is it possible to combine these different approaches or are they mutually exclusive? And, ultimately, how are such conflicts dealt with from a legal perspective? I am well aware that it was not the aim of Surabhi's analysis to answer the last question. But as I confessed at the beginning: I am a formalist and a pragmatist. In other words: I am interested in theory, but I am also interested in how these different theoretical approaches play out in solving legal problems.

While reading the book, I also had the impression that despite Surabhi's rejection of the formalist account, some formalist assumptions are nevertheless discernable in her analysis, namely the distinction between law-making and interpretation. Most strategically created treaty conflicts are not conflicts in the narrow sense, i.e., situations in which

treaty A prohibits the same conduct that treaty B requires. Rather, most treaty conflicts can be categorized as either policy or potential conflicts, seeing as whether or not a conflict arises depends on the case at hand and therefore on the conduct of the states involved. With regard to these categories of treaty conflict scholars proposed different conflict-prevention methods, especially reconciling the relevant treaties or treaty regimes. It is this urge for reconciliation that, I think, motivated Surabhi to develop a radically different perspective on strategically created treaty conflicts, one that focuses on their underlying political dynamics. As she writes:

> **"[I]n many cases, attempts at reconciling treaties may in effect substantially limit or alter one of the treaties, bypassing formal procedures for its amendments. Indeed, that may be their very purpose. Such cases make it evident that legal doctrine's emphasis on reconciliation allows strategic creation of treaty conflicts to be a productive endeavor; for to create a new, conflicting, treaty is to create a new starting point for reconciliation" (p. 11).**

I agree with this argument, which also highlights how important it is for legal scholars to always consider what consequences the methods that they advance to solve a legal problem may carry. At the same time, I wonder: Doesn't the assumption that treaties are altered or limited through strategically created treaty conflicts reflect the formalist hypothesis that it is always possible to distinguish between

changing a treaty and interpreting it because we can always determine the interpretative limits of a specific treaty regime? I should say that although I declared myself a formalist, I am skeptical that we can make a clear, unambiguous distinction between changing and interpreting a treaty. It thus seems equally plausible to conceptualize strategically created treaty conflicts as a struggle over the precise meaning of a legal provision. And even though this struggle is regularly driven by political considerations, at least in cases of strategically created treaty conflicts, I have my doubts whether this actually reveals that international law is either simply epiphenomenal to or a mode of politics. If we look at debates among lawyers, we can observe that in absence of an authoritative decision, these can be fierce, personal and diverse. Based on this observation, strategically created treaty conflicts do not necessarily illustrate how political influence destroys the otherwise orderly functioning of law, but rather exemplify that the struggle over the meaning of law is part of law itself. They illustrate the ambiguities of law and the political compromises that made the creation of law possible, which therefore, and unavoidably so, are reflected in a treaty or a specific legal provision.

Surabhi's inspiring and important book challenged me to rethink much of what I thought I knew about treaty conflicts in particular and international law in general. The few ideas that I have sketched out above should therefore be understood not as criticism, but as a reflection of my own struggles with the topic in light of Surabhi's thorough, complex and rich analysis. My only aim was to contribute questions to what I think is and will continue to be a very important debate.

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